

Virginia Regulatory Town Hall

Proposed Regulation Agency Background Document

Agency Name:	Virginia Department of Health
VAC Chapter Number:	12VAC5-585
Regulation Title:	Biosolids Use Regulations
Action Title:	Notice of Public Comment for Proposed Amendments
Date:	August 13, 2002

This information is required pursuant to the Administrative Process Act (§ 9-6.14:9.1 *et seq.* of the *Code of Virginia*), Executive Order Twenty-Five (98), and the *Virginia Register Form, Style and Procedure Manual*. Please refer to these sources for more information and other materials required to be submitted in the regulatory review package.

Summary

Please provide a brief summary of the proposed new regulation, amendments to an existing regulation, or the regulation being repealed. There is no need to state each provision or amendment or restate the purpose and intent of the regulation, instead give a summary of the regulatory action and alert the reader to all substantive matters or changes. If applicable, generally describe the existing regulation.

The ***Biosolids Use Regulations*** (12 VAC 5-585) were initially adopted by the State Board of Health, in response to HB1067 (1994), which added Sections 32.1-164.5 and 62.1-44.19:3 of the *Code of Virginia* pertaining to standards and permits required for land application, marketing, or distribution of biosolids. The ***Biosolids Use Regulations (Regulations)*** became final in January 1995. A notice was published in the July 10, 1995, issue of the *Virginia Register* requesting additional public comments on certain provisions of the *Regulations*. Technical corrections to the *Regulations* were published in the August 21, 1995, issue of the *Virginia Register*.

Proposed amendments were published in the May 12, 1997, issue of the *Virginia Register* and, on August 15, 1997, the State Board of Health, at its regular business session, adopted final amendments to the *Regulations*, pursuant to the authority granted by Section 32.1-12 and 32.1-164 of the *Code of Virginia*. The final amendments were published in the September 15, 1997 issue of the *Virginia Register* and the amended *Regulations* became final on October 15, 1997. New amendments are being proposed to carry out the provisions of legislation signed into law by the Governor, requiring the State Board of Health to adopt regulations by January 1, 2003, providing for fees to be collected from land appliers of biosolids and used to reimburse local governments for specified expenses.

Basis

Please identify the state and/or federal source of legal authority to promulgate the regulation. The discussion of this statutory authority should: 1) describe its scope and the extent to which it is mandatory or discretionary; and 2) include a brief statement relating the content of the statutory authority to the specific regulation. In addition, where applicable please describe the extent to which proposed changes exceed federal minimum requirements. Full citations of legal authority and web site addresses, if available, for locating the text of the cited authority must be provided. Please state that the Office of the Attorney General has certified that the agency has the statutory authority to promulgate the proposed regulation and that it comports with applicable state and/or federal law.

Legislation passed by the General Assembly (HB 2827, Acts of Assembly c. 831, 2001) and signed into law by the Governor, amended Section 62.1-44.19:3 of the *Code of Virginia* (available electronically at <http://leg1.state.va.us/cgi-bin/legp504.exe?000+cod+62.1-44.19C3>), requiring that by January 1, 2003, the State Board of Health adopt regulations requiring the payment of fees for the land application of biosolids, within local jurisdictions with adopted ordinances providing for the testing and monitoring of such operations, to ensure compliance with applicable laws and regulations. The collected fees will be used to reimburse approved costs of the local monitoring efforts. The necessary documentation will be forwarded to the State Registrar to initiate the public hearing process in accordance with the Administrative Process Act and the Virginia Department of Health Public Participation Guidelines.

Purpose

Please provide a statement explaining the need for the new or amended regulation. This statement must include the rationale or justification of the proposed regulatory action and detail the specific reasons it is essential to protect the health, safety or welfare of citizens. A statement of a general nature is not acceptable, particular rationales must be explicitly discussed. Please include a discussion of the goals of the proposal and the problems the proposal is intended to solve.

The *Regulations* provide the means to protect public health from improper and unregulated disposal of sewage sludge. The new proposed amendments will require the payment of a fee for land application of sewage sludge (biosolids) as permitted either through a Virginia Pollution Abatement Permit (VPA) issued by the Department of Environmental Quality (DEQ), or through an Operation Permit (VDHBUR) issued by the Virginia Department of Health (VDH). The fees will be collected from persons who are permitted to apply biosolids in local jurisdictions that have adopted an ordinance that provides for the testing and monitoring of the land application of biosolids in order to ensure compliance with governing laws and regulations. The fee shall not exceed the amount necessary to reimburse the local jurisdictions for the direct costs of a reasonable amount of testing and monitoring. The fee shall be imposed on each dry ton of biosolids applied to land in local jurisdictions that have adopted an ordinance.

Substance

Please identify and explain the new substantive provisions, the substantive changes to existing sections, or both where appropriate. Please note that a more detailed discussion is required under the statement providing detail of the regulatory action's changes.

An Ad Hoc Advisory Committee has assisted the VDH in developing draft amendments to the *Regulations* for presentation to the Board of Health for approval as proposed amendments in accordance with the Administrative Process Act (APA). Final amendments to the *Regulations* will have to be adopted by the Board of Health by December 2002 in accordance with the APA, in order to meet the deadline mandated in Section 62.1-44.19:3 of the *Code of Virginia*. The amended *Regulations* shall include requirements and procedures for:

1. Collection of fees from land appliers by the VDH;
2. Retention of proceeds in a special nonreverting fund to be administered by the VDH; and
3. Disbursement of proceeds by VDH to reimburse counties, cities and towns with duly adopted ordinances providing for the testing and monitoring of the land application of sewage sludge, as provided for in Section 62.1-44.19:3 of the *Code of Virginia*.

The persons land applying sewage sludge shall (i) provide advance notice of the estimated fee to the generator of the sewage sludge unless notification is waived, (ii) collect the fee from the generator, and (iii) remit the fee to the Department of Health as provided for by the Final Regulation.

Issues

Please provide a statement identifying the issues associated with the proposed regulatory action. The term "issues" means: 1) the primary advantages and disadvantages to the public of implementing the new or amended provisions; 2) the primary advantages and disadvantages to the agency or the Commonwealth; and 3) other pertinent matters of interest to the regulated community, government officials, and the public. If there are no disadvantages to the public or the Commonwealth, please include a sentence to that effect.

The Ad Hoc Advisory Committee met on 7 different occasions and developed recommendations that were used to establish the biosolids fee for the proposed amendments as follows:

1. The fee shall be two dollars and fifty cents (\$2.50) per dry ton of biosolids land applied in counties, cities or towns that have adopted local ordinances, to be adjusted annually in accordance with the federal consumer price index (CPI).
2. Disbursement of the established fees collected by the Division shall be made to reimburse those counties, cities and towns with duly adopted local ordinances, that submit acceptable documentation of reimbursable expenses as provided for in the

amended *Regulations* and as described in a Biosolids Fee Guidance Manual provided to local governments and land appliers by the Division.

The majority of the committee members were in favor of a slightly lower average fee. Other committee members were in favor of a significantly higher fee and submitted a minority report recommending a biosolids fee of up to \$4.00 per dry ton.

The advantage of providing fees to support local monitoring of biosolids land appliers is that the credibility of this controversial state permit program will be enhanced. The availability of resources to support routine surveillance of land application of biosolids, was deemed by the public and local government, to be a key issue in assuring the safety of those operations.

The disadvantage of establishing biosolids fees is that the monthly bills for sewer service will likely increase and that increase will be passed down to the users, those citizens of the Commonwealth served by centralized sewer systems. However, other sewage sludge management options are more expensive than is land application of biosolids. The owners of sewage treatment works have previously estimated that 20% to 40% of the costs, of constructing and managing those facilities, are used for sludge management.

By establishing a reasonable biosolids fee the most economical and most beneficial means of sludge management will continue to be available to the owners of sewage treatment works, who are primarily metropolitan governments.

Fiscal Impact

Please identify the anticipated fiscal impacts and at a minimum include: (a) the projected cost to the state to implement and enforce the proposed regulation, including (i) fund source / fund detail, (ii) budget activity with a cross-reference to program and subprogram, and (iii) a delineation of one-time versus on-going expenditures; (b) the projected cost of the regulation on localities; (c) a description of the individuals, businesses or other entities that are likely to be affected by the regulation; and (d) the agency's best estimate of the number of such entities that will be affected.

Currently, nearly 200,000 dry tons of biosolids are land applied each year in 20 to 30 Counties, on approximately 37,000 acres of farmland. The potential cost savings and production increases, for the farmers that receive biosolids as a substitute fertilizer, has been estimated to range from \$50, to more than \$100, per acre farmed. The VDH implements the *Regulations* through the Office of Environmental Health Services, using about 2 years of staff time annually at a cost of approximately \$150,000. The proposed land application fee should generate up to \$500,00 in revenue each year to reimburse local monitoring expenses. These fees will be paid by the several dozen local governments and a few private corporations, that own or operate sewage treatment facilities, that manage their sludge residuals by land application. The use of local monitors will alleviate the need to increase the VDH staff in order to provide for routine surveillance of operations permitted through the *Regulations*. The current VDH staffing, with support from DEQ and the Department of Conservation and Resources is thought to be adequate to respond to complaints and conduct permit compliance activities as provided by the *Regulations*.

Although the land application fee was established at \$2.50 per dry ton of biosolids applied, the amount of reimbursement for local monitoring costs was not fixed at that level. Discussions of existing local monitoring programs and anticipated future costs during the Ad Hoc Advisory

Committee meetings, suggested that such costs would vary from one locality to another and from one point in time to another. However, it was anticipated that the monitoring expenses would be in proportion to the level of activity in a local jurisdiction as set by the amount of biosolids applied. Subsequent discussions with the Virginia Department of Planning and Budget established the need for a cap or maximum reimbursement level. Several local governments had requested that the land application fee be established at \$4.00 per dry ton of biosolids applied to provide for adequate reimbursement of local monitoring costs that could exceed the average. Thus, a maximum reimbursement level of \$4.00 per dry ton of biosolids applied in a local jurisdiction, was considered to be a reasonable cap.

Detail of Changes

Please detail any changes, other than strictly editorial changes, that are being proposed. Please detail new substantive provisions, all substantive changes to existing sections, or both where appropriate. This statement should provide a section-by-section description of changes implemented by the proposed regulatory action. Where applicable, include citations to the specific sections of an existing regulation being amended and explain the effect of the proposed changes.

The proposed amendments to the *Regulations* include: the addition of several new definitions (Section 10), revisions to the *Regulations* Advisory Committee (Section 270) and the addition of Part VI (Sections 660 to 740) that address the biosolids fee, reimbursable charges for local monitoring, reporting requirements for the land appliers, requirements for submitting reimbursement requests by local government and the procedures for processing the reimbursement requests.

The following list of local monitoring activities describe the reimbursable charges that have been included in the proposed amendments:

1. A review of the permit application related to health protection issues,
Including reviewing data in an application to land-apply biosolids)
2. Travel expenses for site monitoring, inspections, sample collection and delivery and examination of records,. Including reviewing data in the resulting permit, and reviewing the generator's records for information, the contents of which are determined by this chapter.
3. Time charges for the site inspections, including the initial VDH site inspection, and prior to, during and following biosolids application. such inspections: may include verifying sign notices, buffer distances, site management and post application runoff.
4. Records management costs, including data entry, communications and development of reports.
5. Complaint and incident response, including contact with the public and state regulatory agency staff. These activities may involve responding to problematic incidents and complaints, reporting complaints, communicating with the public and communicating with VDH.
6. Sample collection and testing costs including postage and time.

These activities may include, where reasonable, transporting samples to an appropriate laboratory.

7. Reasonable reimbursable expenses involving the training of local monitors.

Reimbursement of Local Monitoring costs deemed reasonable by the Division, will be made in order of receipt of an acceptable invoice. Such invoices will be reimbursed for reasonable costs of at least \$2.50 per dry ton of biosolids land applied in a County during the period of time specified in the submitted invoice. If sufficient revenue from collected fees exists, then invoiced claims exceeding \$2.50 per dry ton of biosolids land applied in that County, during the period of time specified in the submitted invoice, may be released for reimbursement of up to \$4.00 per dry ton of biosolids land applied in that County, based on the order of receipt of the invoice.

Land applicers are required to maintain complete records of the land application activities and amounts of biosolids that they land apply, in those jurisdictions that have duly adopted local ordinances. Such records are to be maintained by the land applicer in a form that is available for inspection by the VDH, for five years after the date of the activity. Land applicers are required to submit a monthly report by the 15th day of the month following the month that land application occurs. That report is to include the information listed in the amended *Regulations* and present a calculation of the total fee that is to be remitted to the VDH. The submitted report also is to include a summary list of the total amount of biosolids applied and calculated fee based on the land applied biosolids, for each County in which land application occurred.

A reimbursement application is to be used to request reimbursement for a local government (the claimant). All information is to be clearly typed or printed and ensure that all required documents are submitted with the application. Additional pages are to be attached as necessary to explain responses. A responsible official, such as a local biosolids monitor, shall sign and date the application where indicated. The original signed application with one copy of each of the supporting documents is to be forwarded to VDH. To confirm delivery, it is suggested that applications be mailed certified, return receipt requested. Applications may not be submitted by facsimile or through electronic means. A reimbursement invoice form must be completed before a reimbursement application can be submitted. The invoice form must include all work performed for the reimbursement period.

Reimbursement application processing procedures intend to reflect a balance of customer service and processing efficiency. Any time an application is lacking documentation or improperly submitted, processing will be delayed. When VDH finds essential information is missing, an evaluation is made to determine if the claim can be processed without the information and if so, what adverse impact the missing information will have with respect to the amount approved for reimbursement. If the claim can be processed without the missing information and the defect can be addressed through the reconsideration process, then the claim is usually processed "as is." If it is not possible to process the claim "as is," VDH will contact the claimant and attempt to resolve the deficiency(ies). If contacted, an applicant will have 14 days from the date of the call or letter to submit the information requested. Extensions of the 14-day deadline will not be granted. An application which does not contain all of the required information after the 14 day time frame may be rejected or processed "as is", which can result in reimbursement being totally

or partially denied. In rare cases, an application may have so numerous, deficiencies, or such significant defects, that it cannot be processed and is rejected immediately, with a written explanation of the defects and remedies needed.

Alternatives

Please describe the specific alternatives to the proposal considered and the rationale used by the agency to select the least burdensome or intrusive alternative that meets the essential purpose of the action.

In light of the clear, specific and mandatory authority of the State Board of Health to promulgate the proposed regulations, the Board has not considered any alternatives to the proposed regulations, nor are any warranted. The Board has, however, carefully drafted the proposed regulations to ensure that they embody the most appropriate, least burdensome and least intrusive framework for effectively regulating the fees for land application of biosolids.

Public Comment

Please summarize all public comment received during the NOIRA comment period and provide the agency response.

The Notice of Intended Regulatory Action, regarding the proposed regulations was published in the *Virginia Register* on January 28, 2002, inviting the public to comment before February 28, 2002. Comments that were received during this period came principally from the Ad Hoc Committee members and were addressed at the committee meetings. The final committee meeting was held on February 20, 2002 and it was decided at that meeting to accept a minority report on the established biosolids fee. However, the Louisa County Board of Supervisors submitted a separate resolution requesting that the biosolids fee be established at \$4.00 per dry ton. The VDH staff decided that a biosolids fee of \$2.50 per dry ton was an appropriate amount based on a model estimating the average local monitoring cost.

Clarity of the Regulation

Please provide a statement indicating that the agency, through examination of the regulation and relevant public comments, has determined that the regulation is clearly written and easily understandable by the individuals and entities affected.

In drafting the proposed Regulations, the Board strove to write provisions that are clear and easily understandable by the individuals and entities affected. The Board has determined that the regulations are clearly written and will be easily understood.

Periodic Review

Please supply a schedule setting forth when the agency will initiate a review and re-evaluation to determine if the regulation should be continued, amended, or terminated. The specific and measurable

regulatory goals should be outlined with this schedule. The review shall take place no later than three years after the proposed regulation is expected to be effective.

The State Board of Health will review and reevaluate the proposed *Regulations* within three years of their becoming effective in order to determine whether they should be continued, amended or terminated.

The measurable goals the proposed *Regulations* are intended to achieve include:

- (i) Whether the proposed *Regulations* effectively reimburse local governments for reasonable monitoring expenses, as gauged by the comments received by the regulated community and discussions of the program during semi-annual meetings of the established *Regulations* Advisory Committee and;
- (ii) Whether, the biosolids fee has been established at the proper amount as gauged by the number and nature of comments and inquiries received from local governments and the regulated community.

The proposed *Regulations* also provide for a more representative regulations advisory committee consisting of appropriate representatives of the concerned professional community, owners and operators of sewerage facilities, public interests and academic experts as appointed by the State Health Commissioner. The advisory committee will meet semiannually or more frequently, if necessary, to consider and evaluate recommendations for the implementation of or revision to, the *Regulations* and related policies concerning the use of biosolids, including land application to farmland.